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NO. PD-0553-20
IN THE COURT OF CRIMINAL APPEALS OF TEXAS

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COURT OF CRIMINAL APPEALS
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NO. 01-18-00897-CR
IN THE COURT OF APPEALS
FOR THE FIRST DISTRICT
AT HOUSTON, TEXAS

No. 1532340
178th Judicial District Court of
Harris County, Texas

JAMAILE BURNETT JOHNSON,
APPELLANT
VS.
STATE OF TEXAS,
APPELLEE

BRIEF OF APPELLANT ON DISCRETIONARY REVIEW

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ORAL ARGUMET NOT PERMITTED

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NAMES OF ALL PARTIES

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178th Judicial District Court
Harris County, Texas

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STATEMENT OF THE CASE

Appellant was indicted on March 3, 2017 for the offense of aggravated robbery. The indictment contained two enhancement paragraphs. (C.R. 14).

Trial was to the jury commencing on September 13, 2018. Appellant was convicted of the lesser included offense of theft on September 14, 2018. Appellant pleaded true to the two enhancements. The jury sentenced Appellant to eleven years confinement in the Texas Department of Correction- Institutional Division. (C.R. 96). Appellant gave timely Notice of Appeal.

On, May 28, 2020, the First Court of Appeals reversed the conviction and remanded the case for a new trial due to ineffective assistance of counsel. *Johnson v. State*, 606 S.W.3d 385 (Tex. App. – Houston [1st Dist.] 2020, pet. granted). In addition, the Court also issued a dissent and concurrence. Id. at 403-406; 407-13. The State did not seek rehearing.

The State timely fined its petition for discretionary review challenging the application of the standard of review applied by the Court of Appeals in analyzing Appellant's ineffective assistance of counsel of counsel claim. On October 21, 2020, this Court granted review.

STATEMENT OF FACTS

Juan Torres, a Galena Park police officer, testified that on November 28, 2016 at about 3:30 p.m. he was dispatched to Truck Zone at 9905 Clinton Drive, Galena Park where he encountered a female who was screaming in Spanish. According to Torres, a fluent Spanish speaker, she advised him that she had been robbed and she appeared scared. (R.R. Vol. II, 152-157).

The Complainant told him her pickup truck, a brown Chevrolet, was taken. Officer Torres conveyed the information to dispatch and the truck was located soon after. The following day, Torres obtained surveillance video from the Truck Zone, which was admitted into evidence and played to the jury. (R.R. Vol. II, 158-166, SE# 8).

Complainant, Veronica Lopez, testified that on November 28, 2016, she drove her husband to the Truck Zone where he was having tires changed. Her husband went inside and she remained in the truck seated in the passenger seat. She noticed a man ride up on a bicycle. The man then got into driver's seat of the truck with a screwdriver in his hand. The truck was already running. The man then asked if she was ready for a ride. She asked if he worked there and he told her he did not and again asked if she was ready for a ride. She opened the door and was hanging on to the door as he accelerated. He did not point the screwdriver but she said he was threatening her with it and she was scared. She was in fear for her life and thought he could have used the screwdriver as a weapon. (R.R. Vol. II, 173-179).

She further testified that she reviewed State's Exhibit 8, the surveillance video and it accurately depicted the incident, including the truck being damaged by her husband throwing a wrench at the window as the man drove off. She identified Appellant as the man who took the truck. Some weeks later when her husband was cleaning the truck, he found s screwdriver in the center console and they threw it away. (R.R. Vol. II, 180-184).

Lopez further testified that when the man first got in the truck, she thought he worked there and she was not afraid. She did not see the screwdriver at first. When she saw the screwdriver, it was in his hand and his hand was on the gearshift. The man did not hit,

stab or point the screwdriver at her. She became fearful when he asked if she was ready for a ride. (R.R. Vol. II, 185-193).

Jorge Gonzalez, Complainant's husband, testified that in the afternoon of November 28, 2016, he was having tires put on his truck at Truck Stop. He had driven with his wife to get the workers tacos and he parked the car leaving her in it while he went inside the garage to deliver the tacos. After being inside about five minutes, the tire man yelled at him that something was happening outside because his wife was screaming. When he went out, he saw the man in his truck and his wife hanging on to the door. He threw a piece of iron at the windshield and his wife managed to free herself and the man drove off. He was able to retrieve the truck later that day and a few weeks later discovered a screwdriver in console. (R.R. Vol. II, 199-203).

Pablo Oreo, a Galena Park PD patrol officer in November, 2016, testified that he made the scene of the incident and aided in the recovery of the vehicle. Officer Martinez initially located the truck and was following it. Oreo fell in behind Martinez and they began a pursuit of the truck that continued for 45 minutes before the vehicle stopped and the driver, Appellant, was taken into custody. Throughout, both officers in their marked vehicles had sirens on and lights flashing. At one point during the chase, in the area of Pleasantville, the truck stopped for approximately three minutes before starting up again. Office Oreo was wearing a body camera at the time and that recording, with the audio

portion redacted, was entered into evidence and published to the jury. (R.R. Vol. II, 208-222; R.R. Vol. III, 7-9; SE# 7).

Lewis Armstead testified that on the date of the incident he went to the home of his mother, which was close to Truck Zone, and Appellant was there visiting. Appellant is his stepson. Although Appellant initially was acting normally, he started behaving irrationally. According to Armstead, this was not an new experience as he had known Appellant all his life and was aware that he was schizophrenic. Appellant went outside and began pulling up grass and rubbing it on his body. Appellant laid down on the train tracks adjacent to the house. Armstead further testified that he called "the law", but they did not take Appellant to the hospital because he was able to answer their questions. (R.R. Vol. III, 27-31).

After "the laws" left, Appellant took off saying "he was going to get his truck". Approximately 20 minute later, Appellant returned in a truck that Armstead knew did not belong to him. Armstead went outside and Appellant told him to get in and that he knew where Armstead's stolen truck was. (R.R. Vol. III, 32-35, 40).

Kenyon Johnson testified that he lived in the Pleasantville neighborhood a few minutes away from Truck Zone. Appellant is his younger brother. On the day of the incident, he saw Appellant driving a truck he knew did not belong to him. Upon seeing Appellant, Kenyon got in his own truck and participated in the chase until told by law enforcement to back off. At the time Appellant was arrested, Kenyon described him as looking "spacey, his normal self." (R.R. Vol. III, 52-54).

According to Kenyon, Appellant owned a Dodge truck. (R.R. Vol. III, 55).

Gwendolyn Johnson, Appellant's mother, testified that on the day of the incident, Appellant called her at work and she later found out that he was being chased by the police. She confirmed that Appellant owned a truck which he had had in Beaumont prior to the incident. She did not know how Appellant had returned to Houston. She reported that she had seen him upon his return and he was aggravated in appearance and not talking normally. (R.R. Vol. III, 56-63).

Appellant testified that a week before the incident he had was in Beaumont in his Dodge truck when he ran out of gas and left the key locked in car. The police came and what followed was a combination of time in Spindletop Hospital being evaluated and time in jail in Beaumont for trespass. He eventually - through hitchhiking, taxi and walking - made it back to Houston. The day of the incident, he went looking for his truck by bicycle with a screwdriver he had bought to pry the door open. He saw a truck he believed to be his. He tried the door and found it open. Upon getting in the truck, he discovered the key was in the ignition and the truck running. There was also a woman sitting in the passenger seat. He asked her if she wanted a ride. She then got out and a man threw a pipe through the windshield. He drove off and, after a brief stop continued on with the police following. He denied knowing that they were in pursuit of him. He eventually stopped when he saw an officer with a gun pointed at him. (R.R. Vol. III, 68-110).

He acknowledged that his truck was grey, and unlike the beige truck he took from Truck Stop, it did not have a stripe or tinted windows. He also testified that, when he was eventually taken out of the car and arrested, he did not tell the officers that he believed the truck to be his. He admitted to having prior convictions for possession of a controlled substance and indecency with a child. (R.R. Vol. III, 69-70, 114-116, 128-131).

SUMMARY OF THE ARGUMENT

The Court of Appeals was correct in concluding that appellant received ineffective assistance of counsel due to trial counsel's failure to present medical evidence of appellant's mental illness and that he was harmed by this failure. The Court applied the proper standard of review in so holding. The defensive theory of the case was that Appellant was operating under a mistake of fact when he drove off in the Complainant's truck. His belief was that he owned the truck.

Appellant contends that he was denied effective assistance of counsel at trial due to defense counsel's failure to offer his medical records in admissible form. These record, as defense counsel indicated to the Trial Court, established Appellant's history of mental illness, which was pivotal evidence in establishing Appellant's lack of intent and mistake of fact.

Appellant was denied effective assistance of counsel at trial because of counsel's failure to properly prepare and present crucial evidence.

Clearly, the crux of the defense in this case was that Appellant suffered from mental illness, which led to his mistaken belief that the Gonzalez truck belonged to him. Through the testimony of Lewis Armstead, Kenyon Johnson and Gwendolyn Johnson, defense counsel attempted to establish that Appellant had a prior mental health history and at the time of the incident was suffering from acute mania. Following this testimony, defense counsel requested a bench conference and the following exchange took place:

MR. HAYNES: We're going to offer his medical records.

THE COURT: Response?

MS. CLEMONS: Your Honor, the State objects to relevancy.

THE COURT: Tell me the relevancy at the bench, please.

MR. HAYNES: These medical records support what Mr. Armstead stated earlier that he is schizophrenic and that he has mental health issues.

MS. CLEMONS: Judge, that all goes to punishment and not to the case in chief.

THE COURT: I'm just asking if it includes the medical records since he came into custody?

MR. HAYNES: These – this specific set of records does not – this specific set does not include the current incarceration.

THE COURT: Okay. Do we have those records?

MR. HAYNES: The current records?

THE COURT: Yes.

MR. HAYNES: If I can explain. I have a portion of the current records and because he's under consistent monitoring they're not – this stamp says incomplete because they're updating daily several times a day.

THE COURT: any response?

MS. CLEMONS: All of this – if we were in an insanity case or something and they had some expert to testify about these records maybe it would be relevant, but right now there is no relevancy or foundation for this to come in the case in chief, guilt or innocence.

THE COURT: What I have difficulty with is there's no foundation laid, nobody can support the documents that's here. I mean, that may be something you're able to arrange at a later point. I'm going to sustain the objection on the basis of foundation. Thank you.

(R.R. Vol. III, 62-64).

Both the United States and Texas Constitution guarantee an accused the right to assistance of counsel. U.S. Const, amend. VI; Tex. Const, art. I, § 10; Tex. Code Crim. Proc. Ann. art. 1.05. This right includes the right to reasonably effective assistance of counsel. *Strickland v. Washington***,** 466 U.S. 668, 686 (1984); *Ex parte Gonzales*, 945 S.W.2d 830, 835 (Tex. Crim. App. 1997). To prove ineffective assistance of counsel, appellant must show that (1) trial counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms; and (2) the result of the proceeding would have been different but for trial counsel's deficient performance. *Strickland,* 466 U.S. at 688-92; *Thompson v. State***,** 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). The movant has the burden of proving her claim by a preponderance of the evidence. *Jackson v. State***,** 973 S.W.2d 954, 956 (Tex. Crim. App. 1998). There is a strong presumption that trial counsel was competent. *Thompson***,** 9 S.W.3d at 813. A trial counsel's actions and decisions are presumed to have been reasonably professional and motivated by sound trial strategy. *Jackson v. State***,** 877 S.W.2d 768,771 (Tex. Crim. App. 1994).

The purpose of the *Strickland* two part test is to judge whether counsel's conduct so compromised the proper functioning of the adversarial process that the trial cannot be said to have produced a reliable result. *Thompson v. State*, 9 S.W.3d 808, 812-13 (Tex. Crim. App. 1999) (citing *McFarland v. State*, 845 S.W.2d 824, 843 (Tex. Crim. App. 1992)); *Ex*

parte Scott, 190 S.W.3d 672 (Tex. Crim. App. 2006) (reasonable probability of a different outcome means it is sufficient to undermine confidence in the result).

Failure to Investigate and Prepare

Defense counsel must investigate the case or make a reasonable decision that makes particular investigations unnecessary. *Strickland*, 466 U.S. at 690-691; *Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003). *See McFarland v. State*, 928 S.W.2d 482, 501 (Tex. Crim. App. 1996), *overruled on other grounds by Mosley v. State*, 983 S.W.2d 249 (Tex. Crim. App. 1998). If the client is indigent or without sufficient funds to hire an investigator or expert, he may be eligible for funds from the court under *Ake v. Oklahoma,* 470 U.S. 68 (1985) and *Ex Parte Briggs*, 187 S.W. 3d 458 (Tex. Crim. App. 2005); *Ex parte Overton*, 444 S.W.3d 632 (Tex. Crim. App. 2014).

Clearly, Defense Counsel was well aware that appellant had serious mental health issues. That was the very foundation of his defense. However, defense counsel failed to present to the jury any medical evidence confirming this history. Had he timely gathered the medical records in properly admissible form for the jury, or secured a medical expert to testify regarding the history contained therein, this evidence would have been compelling corroboration of the testimony of Appellant and the other defense witnesses. Whether Defense Counsel's failures were the result of lack of knowledge of the law regarding the admissibility of medical records or of a failure to adequate prepare prior to

trial. It does not matter. In either case, Appellant was not provided effective assistance of counsel.

In *Ex parte Lilly*, 656 S.W.2d 490 (Tex. Crim. App. 1983), this court stated:

> It is fundamental that an attorney must have a firm command of the facts of the case as well as the law before he can render reasonably effective assistance of counsel. . . . A natural consequence of this notion is that counsel also has a responsibility to seek out and interview potential witnesses and failure to do so is to be ineffective, if not incompetent, where the result is that any viable defense available to the accused is not advanced."

Even if an attorney's manner of conducting a trial was trial strategy, it can be so ill-chosen as to render a trial fundamentally unfair. *United States v. Rusmisel*, 716 F.2d 301, 310 (5th Cir. 1983). Any trial strategy that flows from lack of diligence in preparation and investigation is not protected by the presumption in favor of counsel. *Kenley v. Armontrout*, 937 F.2d 1198, 1304 (8th Cir.), *cert. denied*, 502 U.S. 964 (1991). *Ex parte Amezquita*, 223 S.W.3d 363 (Tex. Crim. App. 2006) (failure to investigate evidence that someone else committed the crime is ineffective assistance); *Wiggins v. Smith*, 539 U.S. 510 (2003) (failure to conduct reasonable investigation is ineffective assistance).

Representation at Trial

The burden of proving ineffective assistance of counsel rests on the convicted defendant by a preponderance of the evidence. *Haynes v. State*, 790 S.W.2d 824, 827 (Tex. Crim. App. 1990). In order to determine whether the defendant has met this burden, the reviewing court looks to the totality of the representation and the particular circumstances of the case in evaluating the reasonableness of an attorney's conduct. *See*, *Ex parte Felton*,

815 S.W.2d 733, 735 (Tex. Crim. App. 1991). The review conducted of defense counsel's representation is highly deferential and presumes that counsel's actions fell within a wide range of reasonable assistance. *Mallett v. State,* 65 S.W.3d 59, 63 (Tex. Crim. App. 2001).

Failure to Present Evidence

It is well settled that in order to be reasonably likely to render reasonably effective assistance to his client, a lawyer must be sufficiently abreast of developments in criminal law aspects implicated in the case at hand." *Ex Parte Williams,* 753 S.W.2d 695, 698 (Tex. Crim. App. 1988).

This is because the Sixth Amendment at a minimum " guarantees an accused the benefit of trial counsel who is familiar with the applicable law." *State v. Bennett,* 415 S.W.3d 867, 879 (Tex. Crim. App. 2013).

As a consequence, " ignorance of well-defined general laws, statutes and legal propositions is not excusable and ... may," if it inures to the client's prejudice, " lead to a finding of constitutionally [ineffective] assistance of counsel." *Ex Parte Chandler*, 182 S.W.3d 350, 358 (Tex. Crim. App. 2005). Knowledge of the predicate set out in the Texas Rules of Evidence for the admission of business records is surely within the category of "well-defined general laws, statues and legal propositions" required to provide effective assistance of counsel. Under Texas Rule of Evidence 803(6), the predicate for admission of business records is testimony that 1) the record was made and kept in the regular course of business; 2) it was the regular course of business to make the record; 3) the record was

made at or near the time of the event it records; 4) the record was made by, or from information transmitted by, a person with knowledge acting in the regular course of business. These elements may be established by the custodian of the records or other qualified witness who can testify that the records satisfy the business records exception to the hearsay rule. Tex. R. Evid. 803 (6). If the proper predicate is laid, medical records are admissible as business records.

Statements made for purposes of medical diagnosis or treatment and describing medical history, past or present symptoms, sensations, or the inception or general cause thereof insofar as reasonably pertinent to diagnosis or treatment. Tex. R. Evid. 803(4). Business records can be self-authenticating if accompanied by an affidavit of the person who would otherwise provide the prerequisites for admission under Rule 803(6) and filed at least14 days before trial and notice of the filing is promptly given to all parties. Tex. R. Evid. 902.

As discussed above, trial counsel failed to secure and present in admissible form the medical records of Appellant, which went to the heart of the defense – that Appellant, as a result of his mental condition mistakenly believed the pickup truck was his.

In *Ake v. Oklahoma*, the Supreme Court held: "[a court] must take steps to assure that the defendant has an opportunity to present his defense." In *Ex Parte Briggs*, wherein retained counsel failed to secure an expert to review medical records, the Texas Court of Appeals in reversing the case found that the failure was ineffective:

> Here, applicant's claim stems from counsel's decision not to fully investigate Daniel's medical records or consult with experts until paid an additional $2500-$7500 in expert fees. This was not a "strategic" decision, it was an economic one. There is no suggestion that trial counsel declined to fully investigate Daniel's medical records because he made a strategic decision that such an investigation was unnecessary or likely to be fruitless or counterproductive. But counsel has an absolute duty "to conduct a prompt investigation of the circumstances of the case and to explore all avenues likely to lead to facts relevant to the merits of the case."

Briggs, 187 S.W. 3d at 476.

Even without examining the contents of the medical records, it is apparent from the statement of defense counsel, which went unchallenged, what they contained – evidence of Appellant's schizophrenia. And, it is undisputable that his strategy was to present to the jury medical evidence of appellant's mental illness. There would be no other reason to offer them. Appellant's trial counsel was constitutionally ineffective; that is, that counsel was deficient and that the deficiency prejudiced Appellant to the extent that a reasonable person would lose faith in the confidence of the outcome of the trial.

The State is incorrect in asserting that the records were not relevant and would not have been admissible had they been offered properly.

The State argues that even if presented in properly admissible form, the medical records would not have been admitted as they were not relevant and their probative value was substantially outweighed by the danger of prejudice, confusing the issues, or misleading the jury. (State's Brief 24).

Initially, it is worth noting that the trial court clearly signaled that the reason for not admitting the records was solely the lack of foundation and not on the basis of the State's relevancy objection:

MS. CLEMONS (Prosecutor): All of this – if we were in an insanity case or something and they had some expert to testify about these records maybe it would be relevant, but right now there is no relevancy or foundation for this to come in the case in chief, guilt or innocence.

THE COURT: What I have difficulty with is there's no foundation laid, nobody can support the documents that's here. I mean, that may be something you're able to arrange at a later point. I'm going to sustain the objection on the basis of foundation. Thank you.

(R.R. Vol. III, 64).

Medical evidence of appellant's schizophrenia was relevant. The defendant's right to present a defense generally includes the due process right of the admission of competent, reliable, exculpatory evidence to rebut any of the elements of the charged offense. U.S.C.A. Const. Amend. 14. Relevant evidence may be presented which the jury may consider to negate the *mens rea* element, and this evidence may sometimes include evidence of a defendant's history of mental illness.

Texas does not recognize diminished capacity as an affirmative defense. *Smith v. State*, 314 S.W.3d 576 (Tex. App. – Texarkana 2010, no pet.)(citing *Ruffin v. State*, 270 S.W.3d 586, 593 (Tex. Crim. App. 2008); *Jackson v. State*, 160 S.W.3d 568, 573 (Tex. Crim. App. 2005). "Rather, it is a failure-of-proof defense in which the defendant claims that the State failed to prove that he had the required state of mind at the time of the offense." *Smith,* 314 S.W.3d at 590 (quoting *Jackson* 160 S.W.3d at 573-74; *Ruffin,* 270 S.W.3d at 593). As with the other elements of the offense, relevant evidence mat be presented which the jury may consider to negate the *mens rea* element … including evidence of a Defendant's history of mental illness," provided that the evidence is admissible under the Texas Rules of Evidence. *Jackson*, 160 S.W.3d at 574. The *Ruffin* case further held:

We repeat and reaffirm our holding in Jackson that relevant evidence may be presented

which the jury may consider to negate the *mens rea* element. And this evidence may sometimes include evidence of the defendant's history of mental illness. We quoted article 38.36 in Jackson for the unremarkable proposition that both the State and the defendant may offer testimony as to the relevant facts and circumstance going to show the condition of the mind of the accused at the time of the offense. This is one of the few Texas statutes that explicitly states the obvious: evidence offered by either the defendant or the prosecution is relevant (and presumptively admissible) to prove or disprove the pertinent *mens rea* at the time of the offense. *Supra*, 596.

The trial court's decision to exclude evidence of mental illness is reviewed for an abuse of discretion. *Jackson v. State*, 160 S.W.3d 568, 575 (Tex. Crim. App. 2005).

It is worth noting that both Jackson and Ruffin specifically refer to 'history' - what went before – being admissible. The State argues that the medical records were not admissible as they did not address Appellant's medical condition on the very day of the incident, as if schizophrenia were something that just goes away. The medical evidence of appellant's long history coupled with the testimony of appellant and his family would be compelling evidence that Appellant was in the throes of an episode at the time he took the truck.

The State is incorrect in arguing that the entirety of the medical records would have had to have been admitted before the jury.

Appellant has never contended that the trial court erred in its ruling regarding Defense Exhibit 1. Appellant's complaint is the trial counsel did not do his job in presenting medical evidence to support the defense that the State had failed to establish the *mens rea* required for conviction. It would not have been necessary to offer the entirety of those records.

The State argues, on the issue of the harm analysis, that the medical records contained some material prejudicial to Appellant. This presupposes that, had appellant had the benefit

of effective representation at trial, the records would have been admitted in their entirety. This argument is flawed. Appellant does not attack the conduct of his trial counsel at the one moment when he was offering the records, but his actions or lack thereof, in preparing for and in defending Appellant at trial. Trial counsel's feeble attempt to get records that Appellant had a long history of schizophrenia admitted, simply evidences the fact that trial counsel knew of this medical history and did not manage to get this compelling evidence before the jury. When competent counsel would

Texas Rule of Evidence 107 allows for the admission of otherwise inadmissible evidence when that evidence is necessary to fully and fairly explain a matter opened up by the adverse party. Tex. R. Evid. R. 107. *Bezerra v. State,* 485 S.W.3d 133, 142-143 (Tex. App. – Amarillo 2016, pet. ref'd.) However, the admitted portion or the other evidence that the proponent attempted to admit must be on the same subject and must be necessary to make it fully understood. *Saucedo v. State,* 129 S.W.3d 116, 123 (Tex. Crim. App. 2004).

Though medical records may be admissible as a business record under Texas Rules of Evidence, Rule 803(6), particular statements contained within can be challenged and properly redacted. *See* Tex. R. Evid. 803(6). When a business receives information from a person who is outside the business and has no business duty to report or to report accurately, those statements are not covered by the business record exception. *Garcia v. State*, 126 S.W.3d 921, 926 (Tex. Crim. App. 2004). When the business records contain "hearsay within hearsay" the proponent must establish that the multiple hearsay statements are independently admissible. *See* Tex. R. Evid. 805. When hearsay contains hearsay the Rules of Evidence require that each portion of the combined statements be within an

exception to the hearsay rule. *Sanchez v. State,* 354 S.W.3d 476, 485-86 (Tex. Crim. App. 2011).

The statements relied on by the State to support the proposition that the records would have been harmful to appellant were subject to a challenge on the basis that they were not made for medical diagnosis or treatment. A statement made for and reasonably pertinent to a medical diagnosis or treatment, and that "describes medical history; past or present symptoms or sensations; their inception; or their general cause" may be admissible as an exception to the rule against hearsay. Tex. R. Evid. 803(4).

To establish this exception, normally the proponent of the evidence must show that the out-of-court declarant was aware that the statements were made for purposes of medical diagnosis or treatment and that proper diagnosis or treatment depended upon the veracity of the statements. *Taylor v. State,* 268 S.W.3d 571, 588-89 (Tex. Crim. App. 2008). The proponent must also show that the statements are pertinent to diagnosis or treatment, i.e., that it was reasonable for the care provider to rely on the statements in diagnosing or treating the declarant. *Id*. at 591.

The statements listed by the state as support for the theory that the records would not have been beneficial to appellant's defense do not fall within the Rule 803(4) exception to the hearsay rule.

Additionally, the statements included in the medical records relating to allegations of extraneous bad acts of Appellant would have been subject to objection. It has long been the case that the rules of evidence prohibit the introduction during guilt or innocence of other crimes or wrongs alleged to have been committed by the defendant. *Daggett v. State*,

187 S.W.3d 444, 450-51 (Tex. Crim. App. 2005). The rationale behind disallowing such evidence was the prejudicial effect it would have on the defendant, specifically the concern that the jury would convict the defendant for being a criminal in general rather than holding the State to their burden to prove the offense charged. Rule 403 provides specific guidelines for balancing the probative value of evidence against the danger on undue prejudice. If portions of the medical records relating to extraneous bad acts and offenses were to be proffered by the State, such evidence would have been subject to a harm analysis under Tex. R. Evid., Rule 403.

Furthermore, Appellant did testify at guilt or innocence and admitted he had to having prior convictions for possession of a controlled substance and indecency with a child. Therefore, that information was before the jury without the admission of those portions of the records. (R.R. Vol. III, 128-131).

The Court's review of appellant's medical records was proper.

The State contends that, since Appellant's medical records were offered but not admitted by the trial court, the Court of Appeals should not have considered those records in evaluating ineffective assistance claim. The State's rationale is unsound.

The failure to secure admission of those records at trial is the very basis of Appellant's complaint regarding his trial counsel's performance. The fact that trial counsel

did not make a bill of review including those records for appellate review, is only further indication of his failure to provide effective assistance of counsel.

Though, generally, items not in evidence are not considered on direct appeal, there are exceptions to this rule. Documents or items that in some way make it into the record and are treated by the court and parties as if introduced are properly considered on appeal. In *Amador v. State*, only a portion of a videotape of a stop was viewed by the trial court at a suppression hearing but not offered or admitted and the entirety of the recording was obtained by and considered by the Court on appeal. *Amador v. State,* 221 S.W.3d 666, 674 (Tex. Crim. App. 2007); In *Hardin v. State*, where a photograph was displayed at trial but not "formally offered, introduced into evidence nor brought forward in the record" the Court requested it be brought forward and used it assessing sufficiency. *Hardin v. State,* 417 S.W.2d 170, 174 (Tex. Crim. App. 1967).

Granted, in this case, the records were not treated as admitted at trial. However, the underlying reasoning of *Amador* and *Hardin* weighs in favor of making them available for appellate review. Like *Amador* and *Hardin,* the issue regarding the records in dispute herein is not one of authenticity of the evidence, but simply the lack of process. Unlike *Amador* and *Hardin,* the records here are not being considered to establish an ultimate fact issue, but only to address whether Appellant was provided effective assistance.

The State relies on *Rouse v. State* wherein this Court reversed an appellate court finding of ineffective assistance of counsel in reliance on trial counsel's affidavit which was filed with the clerk post trial and not admitted at a post-trial hearing. However, in *Rouse,* the affidavit in question was unsworn. *Rouse v. State,* 300 S.W.3d 754 (Tex. Crim. App. 2009). In this case, the records considered by the Court of Appeals did, in fact, contain a sworn affidavit from the custodian of the records. (Opinion, 25).

The State argues that Appellant cannot establish harm because the substance of those records in unknown. In almost the same breathe that they complain of the Court of Appeals review of the records, the State presents to this Court every statement within those records potentially cast a negative light on Appellant. The State's use of the content of those records in their argument has placed the records squarely before this Court. What they do not do either at trial, in their brief before the court of appeals, in their petition for discretionary review, or in their brief before this court, is to challenge the authenticity of the records or the fact that they contained evidence of Appellant's severe and long standing mental illness.

Both prongs of Strickland are established without the necessity of knowing the particulars of the medical records.

If this Court finds that it was is improper for the Court of Appeals to consider the medical records, the record is still clear that appellant was denied ineffective assistance of

counsel and that he was harmed. The unsuccessful attempt by trial counsel to present medical evidence confirming that appellant had long suffered from schizophrenia clearly establishes that trial counsel was well aware that such evidence existed. Yet, he did not successfully bring any of that information before the jury. There are myriad methods he could have employed to get this information before the jury. Whether his decision to pursue submission of the medical records rather than present a medical expert was sound trial strategy is not part of this review. However, it is undeniable that it was trial counsel's strategy to provide the jury with the information contained within the records and he failed to do so. Basically, the attack on the *mens rea* element was Appellant's only defense, and it was severely curtailed by trial counsel's failure to provide the jury with medical evidence in support of that defense. Ultimately, the jury was left with only the testimony of Appellant himself and his family. Appellant's right to effective assistance of counsel includes the right to present evidence of mental illness to rebut proof of his *mens rea*. Not affording Appellant the means to muster a lack of evidence defense violates his constitutional due process right to present a defense. He was denied that right and he should be provided a new trial.

PRAYER

For the reasons set out above, Appellant requests this Court to deny the petition for discretionary review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This is to certify that the Brief of Appellant filed in this cause on January 28, 2021, contains 6,006 words.

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CERTIFICATE OF SERVICE

This is to certify that on January 28, 2021 a true and correct copy of the above and foregoing document was served on Daniel McCrory, Harris County Assistant District Attorney by eservice.

By: /S/ WINDI AKINS PASTORINI
Windi Akins Pastorini

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